Sandanadass a/l Lawrance v Teoh Ah Hwa

HIGH COURT (ALOR SETAR) — RAYUAN SIVIL NO 11–18 OF 2001(2)
BALIA YUSOF JC
25 JULY 2002

Civil Procedure *— Appeal — Notice of appeal — Whether first notice of appeal defective as it was neither dated nor sealed — Second notice of appeal served outside the time prescribed in O 49 r 2(3) and (6) of the Subordinate Courts Rules 1980 — Subordinate Courts Rules 1980 O 49 r 2(3), (6) — Whether respondent had notice of pending appeal — Whether irregularity constituted a fundamental defect in procedure*

Civil Procedure *— Appeal — Record of appeal — Undated draft order appealed from enclosed in record of appeal — Sealed copy of such order enclosed in supplementary record of appeal — Whether prejudice caused to the defendant — Whether applicaton for an extension of time to serve the supplementary record of appeal on the respondent necessary*

Civil Procedure *— Appeal — Memorandum of appeal — Notice of appeal — Whether there was a contradiction between the memorandum of appeal and the notice of appeal*

This was an appeal against the decision of the magistrate's court dismissing the claim of the appellant arising from a road accident involving the parties. At the outset, the respondent raised the following preliminary objections. First, the respondent contended that there were two notices of appeal filed by the appellant. With regards the first notice of appeal, the respondent contended that contrary to O 49 of the Subordinate Courts Rules 1980 ('the SCR') the notice of appeal was defective as it was neither dated nor sealed. As for the second notice of appeal, the respondent contended that it was served outside the time prescribed by O 49 r 2(3) and (6) of the SCR. Secondly, the respondent contended that the record of appeal did not contain a sealed copy of the judgment. It was asserted that the undated draft order enclosed in the record of appeal was insufficient for the purposes of the SCR and accordingly, the appeal was not properly before the court. It was also contended that the grounds of decision and notes of evidence contained in the appeal record were not confirmed in accordance with s 76 of the Evidence Act 1950. Thirdly, an objection was taken against the supplementary appeal record on the ground that it was filed late and without leave of the court. It was also contended that the supplementary record was not served on the respondent and neither was there an application for extension of time to serve the same on the respondent. Lastly, the respondent alleged that there was a contradiction between the notice of appeal and the memorandum of appeal in that the former stated the appeal to be against the whole decision of the magistrate whereas the latter merely stated that the appeal was confined to the issue of liability of the parties.

Held, dismissing the preliminary objections:

(1) A notice of appeal serves as a notice to the respondent that an appeal is pending and in the instant case, by the service of the first notice of appeal, the respondent was fully informed and made aware of that fact. The respondent was therefore not caught unaware or by surprise and neither was he prejudiced. As a matter of fact, the respondent was subsequently served with another notice although out of time. The irregularity in the notice of appeal did not constitute a fundamental defect in procedure and therefore, it should be curable. The irregularity in the instant appeal was not so serious as to have caused prejudice to the respondent and thus, the respondent's objection on this ground failed. In light of the above, the respondent's objection on the ground that no application for extension of time was made to file the second notice of appeal outside the permissible period by the appellant also failed (see pp 219G–H, 220F, 221C).

(2) The supplementary appeal record contained only the sealed copy of the order and nothing else. Having perused the same and the draft order in the appeal record, the court failed to see how the respondent had been prejudiced by the said document. The only difference between the two documents seemed to be the presence of the court's seal and the registrar's signature on the document in the supplementary appeal record which contained a sealed order of the court. The appellant had taken the necessary steps to remedy the appeal record. Further, under Practice Direction No 2 of 1998, there was no necessity to apply for leave to file a supplementary appeal record, and for that matter an appeal record can be filed at the first instance even without the order appealed from (see p 222F–H).

(3) The certification in respect of the notes of evidence and the grounds of decision respectively were self explanatory and needed no further elaboration. Such certification was sufficient for the purposes of s 76 of the Evidence Act 1950 (see p 223F).

(4) In an appeal of this nature, namely on the question of liability in an accident claim, once the issue of liability is appealed against and if subsequently allowed, the issue of quantum of damages will also be accordingly affected and/or need to be altered. It does not mean that if the issue of quantum is not pleaded in the memorandum of appeal it cannot be disturbed even if the issue of liability of the parties to the claim is reversed or apportioned accordingly. The contradiction between the notice of appeal and the memorandum of appeal was not of such a nature as to cause prejudice to the respondent (see p 223G–I).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan mahkamah majistret yang menolak tuntutan perayu yang berbangkit daripada kemalangan

jalanraya yang melibatkan pihak-pihak tersebut. Pada mulanya, responden membangkitkan bantahan-bantahan awal yang berikut. Pertama, responden menegaskan bahawa terdapat dua notis-notis rayuan yang difailkan oleh perayu. Berhubung notis rayuan pertama, responden menegaskan bahawa bertentangan dengan A 49 Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR'), notis rayuan tersebut tidak sempurna kerana ia tidak bertarikh maupun dimeterai. Berhubung notis rayuan kedua, responden menegaskan bahawa ia disampaikan di luar masa yang ditetapkan oleh A 49 k 2(3) dan (6) KMR. Keduanya, responden menegaskan bahawa rekod rayuan tersebut tidak mengandungi sesalinan penghakiman yang dimeterai. Ia telah ditegaskan bahawa draf perintah yang tidak bertarikh yang dilampirkan dalam rekod rayuan adalah tidak memadai bagi tujuan KMR dan sewajarnya, rayuan tersebut tidak dikemukakan dengan sempurna di hadapan mahkamah. Ia juga telah ditegaskan bahawa alasan-alasan keputusan dan nota-nota keterangan yang terkandung dalam rekod rayuan tidak disahkan menurut s 76 Akta Keterangan 1950. Ketiganya, satu bantahan telah dibuat terhadap rekod rayuan tambahan atas alasan bahawa ia telah difailkan lewat dan tanpa kebenaran mahkamah. Ia juga telah ditegaskan bahawa rekod tambahan tersebut tidak disampaikan ke atas responden dan juga tidak terdapat permohonan untuk lanjutan masa untuk menyampaikan yang sama ke atas responden. Akhir sekali, responden mengatakan bahawa terdapat percanggahan antara notis rayuan dan memorandum rayuan iaitu yang terdahulu menyatakan rayuan tersebut menentang keseluruhan keputusan majistret sedangkan yang terkemudian hanya menyatakan bahawa rayuan tersebut terlingkung kepada isu liabiliti pihak-pihak tersebut.

Diputuskan, menolak bantahan-bantahan awal tersebut:

(1) Satu notis rayuan bertindak sebagai satu notis kepada responden bahawa sesuatu rayuan menanti penyelesaian dan dalam kes semasa, dengan penyampaian notis rayuan pertama, responden telah dimaklumkan sepenuhnya dan diberitahu tentang fakta tersebut. Responden, oleh itu, tidak terkejut atau terperangkap tanpa pengetahuan mengenainya dan beliau juga tidak diprejudiskan. Pada hakikatnya, responden telah kemudiannya disampaikan dengan satu notis lagi meskipun di luar masa yang ditentukan. Luar aturan dalam notis rayuan tersebut bukan merupakan satu kecacatan serius dalam prosedur dan oleh itu, ia sepatutnya boleh dipulihkan. Luar aturan dalam rayuan semasa tidak sebegitu serius sehingga menyebabkan prejudis kepada responden dan oleh itu, bantahan responden atas alasan ini gagal. Berdasarkan perkara di atas, bantahan responden atas alasan bahawa tiada permohonan untuk lanjutan masa telah dibuat untuk memfailkan notis rayuan kedua di luar tempoh yang dibenarkan oleh perayu juga gagal (lihat ms 219G–H, 220F, 221C).

(2) Rekod rayuan tambahan hanya mengandungi salinan perintah yang dimeterai dan tiada apa yang lain. Setelah menelitinya dan draf perintah dalam rekod rayuan tersebut, mahkamah gagal melihat bagaimana responden telah diprejudiskan oleh dokumen tersebut. Satu-satunya perbezaan antara kedua-dua dokumen tersebut adalah terdapatnya meterai mahkamah dan tandatangan pendaftar atas dokumen dalam rekod rayuan tambahan tersebut yang mengandungi satu perintah mahkamah yang telah dimeteraikan. Perayu telah mengambil langkah-langkah yang perlu untuk meremedikan rekod rayuan tersebut. Selanjutnya, di bawah Arahan Amalan No 2 Tahun 1998, tiada keperluan untuk memohon kebenaran bagi memfailkan satu rekod rayuan tambahan, dan satu rekod rayuan boleh difailkan pada mulanya meskipun tanpa perintah yang dirayukan (lihat ms 222F–H).

(3) Perakuan berhubung nota-nota keterangan dan alasan-alasan keputusan masing-masing menerangkan maksudnya dengan tersendiri dan tidak memerlukan sebarang penghuraian selanjutnya. Perakuan tersebut memadai bagi tujuan s 76 Akta Keterangan 1950 (lihat ms 223F).

(4) Dalam rayuan sebegini, khususnya berhubung persoalan liabiliti dalam satu tuntutan kemalangan, sebaik sahaja isu liabiliti dirayu dan jika dibenarkan kemudiannya, sudah tentu isu kuantum ganti rugi akan terjejas dan/atau perlu diubah. Ini tidak bermakna bahawa jika isu kuantum tidak diplidkan dalam memorandum rayuan, ia tidak boleh diganggu meskipun isu liabiliti pihak-pihak tuntutan tersebut diterbalikkan atau diagihkan dengan sewajarnya. Percanggahan antara notis rayuan dan memorandum rayuan tidak bersifat sedemikian hingga menyebabkan prejudis kepada responden (lihat ms 223G–I).]

Notes

For cases on notices of appeal, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1095–1100.

For cases on record of appeal, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1126–1168.

For cases on memorandum of appeal, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 970–977.

For cases on record of appeal, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1095–1100.

Cases referred to

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors [2000] 1 MLJ 335 (refd)

Harkness v Bell's Asbestos and Engineering Ltd [1967] 2 QB 729 (refd)

Lee Lan v Lim Yoon Loy & Ors [1991] 3 MLJ 419 (refd)

Metroinvest Anstalt & Ors v Commercial Union Assurance Co plc [1985] 2 All ER 318 (refd)

Peggy Mavis Moreira (representing the estate of Frances Theodara Eveleen Foenander, deceased) & Anor v Manivail s/o Ramasamy [2001] 2 MLJ 79 (refd) A

Ratnam v Cumarasamy & Anor [1965] 1 MLJ 228 (refd)

Sii Toh Sing v Hung Ming Chung [2000] 2 MLJ 204 (refd)

Soh Keng Hian v American International Assurance Co Ltd [1996] 1 MLJ 191 (refd) B

Tan See Yin Vincent v Noone & Co & Anor [1995] 1 MLJ 705 (refd)

Appeal from: Summons No 73–122–1999 (Magistrate's Court, Sungai Petani)

Sarjeet Singh Sandu (*Sandu & Assoc*) for the appellant. C

Sharon Khor Guat Leng (*Shanmugavadivelan a/l P Nagasamy* with her) (*Hoe & Ahmad Zaki*) for the respondent.

Balia Yusof JC: This is an appeal against the decision of the learned Magistrate, Sungai Petani given on 26 February 2001 dismissing the claim of the appellant arising from a road accident involving the appellant who D was riding a motorcycle with the respondent's motorcar.

At the outset of the hearing of the appeal before me, the respondent put up a preliminary objection on a number of issues which I will deal with accordingly as submitted by the parties.

Firstly, it is contended by the respondent that there were two notices of E appeal filed by the appellant which were served on the respondent on 3 March 2001 and 29 March 2001 respectively. In so far as the first notice of appeal is concerned, it is contended by the respondent that this notice is defective in that it is not dated or sealed with the court's seal in contravention of O 49 of the Subordinate Court Rules 1990 ('the Rules'). F As for the second notice of appeal, it is the respondent's contention that the service of the second notice on 29 March 2001 is defective in that it was served more than one month after the date of the decision of the learned magistrate given on 26 February 2001. In this respect, specifically O 49 r 2(3) and (6) of the Rules have been contravened. Further, there was no application for an extension of time to file the notice of appeal and as such, G there is no proper appeal before this court to deal with.

Secondly, the respondent contends that the record of appeal does not contain a sealed copy of the judgment. The undated draft order enclosed in the record of appeal is insufficient for the purposes of the Rules and accordingly, the appeal is not properly before this court and this court has H no jurisdiction to hear the appeal. It is also contended that the grounds of decision and notes of evidence contained in the appeal record are not confirmed in accordance with s 76 of the Evidence Act 1950.

Thirdly, the objection of the respondent is aimed at the supplementary appeal record which was filed late and without the leave of the court. Coupled with this, the same was also not served on the appellant and no I application was ever made for an extension of time to the court to have the same served on the appellant.

A And lastly, it was contended by the respondent that there is a contradiction between the notice of appeal and the memorandum of appeal in that while the notice of appeal states that the appeal is against the whole of the decision of the learned magistrate, the memorandum of appeal merely states that the appeal is only confined to the issue of liability of the parties and accordingly, this appeal ought to be dismissed.

B I shall now deal with each of the contentions of the respondent and the submissions of the parties and examine them accordingly in the light of the authorities and the principles involved on the points raised.

Defective notice of appeal

C In her submission before the court, counsel for the respondent indicated that the first notice of appeal served on the appellant is defective in that it does not indicate the date on which the same was filed. The said notice merely contained the date of the notice of appeal which was 3 March 2001. The notice of appeal on p 1 of the appeal record (encl 6) which in her D submission is the second notice of appeal shows the date of the notice of appeal and the date of filing of the same is indicated as 5 March 2001. However, this second notice was only served on the appellant on 29 March 2001 which is well outside the permitted time under O 49 r 2(6) of the Rules which provides:

E > The notice of appeal shall be served by the appellant within the time limited for the filing of appeal on all parties directly affected by the appeal or their respective solicitors. It shall not be necessary to serve parties not so affected.

The time for filing a notice of appeal as provided in O 49 r 2(3) of the Rules is 14 days from the date on which the decision was pronounced.

F In support of her argument before me, learned counsel for the respondent relied on the case of *Lee Lan v Lim Yoon Loy & Ors* [1991] 3 MLJ 419 which held that O 49 r 2(6) of the Rules requires the notice of appeal to be served on the parties affected by the appeal within 14 days from the date of the decision and that the notice of appeal must show the date on which it was filed in the court appealed from to show that O 49 r 2(3) of the G Rules has been complied with. A notice of appeal serves as a notice to the respondent that an appeal is pending and in the instant case by the service of the first notice of appeal, the respondent is fully informed and made aware of that fact. The respondent is therefore not caught unaware or by surprise and I do not see in what manner he is prejudiced. As a matter of fact, the respondent was subsequently served with another notice although H out of time. The case of *Lee Lan v Lim Yoon Long & Ors* quoted by the learned counsel for the respondent can easily be distinguished from the present appeal because in that case, the notice of appeal was never served on the party at all. There was therefore no service of the notice of appeal to bring the appeal into existence.

I Reliance was also placed on the authority of *Soh Keng Hian v American International Assurance Co Ltd* [1996] 1 MLJ 191 where Gopal Sri Ram JCA said at p 194:

> We do not intend to dwell upon the rules of court. This order is clear. An appeal is brought to this court by filing and serving the notice of appeal. The one act without the other renders the appeal incompetent. There are scores of authorities on the point commencing from *Gurbachan Singh v Seagrott & Campbell (No 2)* [1962] MLJ 370.

It is interesting to note that in the said case, the respondent's solicitors waited for more than two months to be served with the notice of appeal. They were not. The respondent then filed a motion to strike out the appeal and still that did not move the appellant to take any action. It was only three days before the hearing of the respondent's motion to strike out the appeal that the appellant put in his application to have time extended for service of the notice of appeal. The court duly refused the appellant's application. Clearly, this case is also easily distinguishable from the case before me now and suffice it to say that the appellant in the present case before me has done both the filing and serving of the notice of appeal.

In reply to the submissions made by counsel for the respondent, learned counsel for the appellant has urged this court to waive the irregularity in the notice of appeal. The function of this court is to do justice and not merely to dispose off cases on the ground of mere technicalities. It is trite that rules are meant to be obeyed by all parties unless they have exceptionally good grounds for non-compliance for which the court may exercise its discretion (*Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [2000] 1 MLJ 335 and *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228) and failure to comply with them will lead to chaos in the conduct of litigation (*Syarikat Telekom Malaysia v Business Chinese Directory Sdn Bhd* [1994] 2 MLJ 420 at p 423, per Eusoff Chin SCJ (as he then was)). Be that as it may, this court is at the same time seised of the power and discretion under O 2 of the Rules of the High Court 1980 to treat the irregularity as not to nullify the proceedings before me. The irregularity in the notice of appeal does not in my view constitute a fundamental defect in procedure and therefore it should be curable. This court is empowered by the said Order to cure such irregularities consisting of failure to comply with the Rules. Rule 1 should be construed widely and generously to give effect to its manifest intentions, thus, every omission or mistake in practice or procedure is to be regarded as an irregularity which the court can and should rectify so long as it can do so without causing injustice (*Harkness v Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729). As to how the court should exercise its discretion to rectify this irregularity, I find comfort in citing a passage from the judgment of Augustine Paul JC (as he then was) in the case of *Re CHS* [1997] 3 MLJ 152 where his Lordship referred to what Cumming Bruce LJ said in *Metroinvest Anstalt & Ors v Commercial Union Assurance Co plc* [1985] 2 All ER 318 at p 324:

> I would say that in most cases, the way in which the court exercises its power under O 2 r 1(2) [Rules of the Supreme Court] is likely to depend on whether it appears that the opposite party has suffered prejudice as a direct consequence of the particular irregularity, that is to say the particular failure to comply with the Rules. But I would construe O 2 r 1(2) as being so framed as to give the court the widest possible power in order to do justice.

A The Supreme Court in *Tan See Yin Vincent v Noone & Co & Anor* [1995] 1 MLJ 705, speaking of O 2 r 1 says at p 718:

> The power given to the court by O 2 r 1 [Rules of the High Court 1980] is a power to cure irregularities consisting of failure to comply with the rules. 'The authorities taken as a whole show that O 2 r 1 should be applied liberally in order, so far as reasonable and proper, to prevent injustice from being caused to one party by mindless adherence to technicalities in the rules of procedure' (1 Supreme Court Practice 1991 at p 10).

B

It follows therefore that only if the irregularity is so fundamental and so serious to the extent that the other party is prejudiced by such irregularity that this court will not invoke its power under the said rule. On the facts and C circumstances of the appeal before me, I hold that the irregularity in the instant appeal is not so serious as to have caused prejudice to the respondent and for that reason, I hold that the respondent's objection on this ground fails. In light of the above, the respondent's objection on the ground that no application for extension of time was made to file the second notice of appeal outside the permissible period by the appellant also fails.

D

Defective record of appeal

The second attack launched by the respondent against the appeal was made on the record of appeal in respect of the draft order which was enclosed at pp 39 and 40 of the appeal record (encl 6). It is the contention of the E respondent that the inclusion of the draft order in the appeal record is in contravention of O 49 r 3A(1)(d) of the Rules citing *Alor Janggus Soon Seng Trading Sdn Bhd & Ors* as an authority for the proposition that a draft judgment is not a judgment, since a draft implies that it needs perfection and approval and in order to be included in the appeal record, it must be a F sealed order and not a draft order.

In *Sii Toh Sing v Hung Ming Chung* [2000] 2 MLJ 204, Tee Ah Sing J said at p 210:

> ... I am of the view that the word 'decision' in O 49 r 6(3)(d) of the SCR [Subordinate Courts Rules 1980] could only mean the sealed judgment, that is to say, a judgment that is drawn and entered in accordance with O 29 rr 9 G and 10 of the SCR (See *Teoh Soon Kok t/a TSK Supplies Trading v MBf Finance Bhd* [1995] 2 CLJ 130).

In *Mat Yasin bin Dollah v Ibrahim bin Hussin & Anor* [1997] 2 MLJ 681, his Lordship Nik Hashim JC in p 684 said:

> 'Order 49 r 3A(1) is mandatory in its terms by reason of the word 'shall' H in the rule (see *Datuk Bandar Kuala Lumpur v Seman bin Amat and other cases* [1996] 3 CLJ 263). Accordingly, strict compliance with its provision is called for and failure to enclose any one of the items in the record as required by the rule, in my view, will render the appeal record defective. It has been said time and again that rules of courts must be obeyed (*Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228) and must be I meticulously and faithfully complied with (per Low Hop Bing JC (as he then was) in *S Ravi a/l G Suppiah v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1995] 2 CLJ 152 at p 154). Failure to comply with them will lead to chaos in the conduct of litigation (*Syarikat Telekom*

Malaysia Bhd v Business Chinese Directory Sdn Bhd [1994] 2 MLJ 420 at p 423, per Eusoff Chin SCJ (as he then was)).

Thus, without the decision and following *Teoh Soon Kok*, I hold that the appeal record in the present case was not properly before the court.

The record suffered from a serious defect for not being in compliance with the strict rules of O 49 r 3A(1)(d) of the SCR.'

I am of the view that O 49 r 6(3) of the SCR is mandatory in its terms by reason of the word 'shall' in the rule. So it is a mandatory requirement for the record of appeal to contain the decision appealed from.

...

In the result, the record of appeal without the decision is incomplete. I hold that the record of appeal in the present case was not properly before the court and this court has no jurisdiction to hear this appeal.

I am in agreement with those words and certainly the decision of the High Court is very persuasive. Pausing for a moment, having sieved through the facts of the case before me, I am constrained not to follow that decision and seek to make a distinction on the ground that the sealed copy of the order was never filed in the above mentioned case. The appellant in the case before me however has filed a supplementary appeal record enclosing the sealed copy of the order. That supplementary appeal record was filed by the appellant on 27 November 2001 (encl 10) and served on the respondent. The appellant in his submission contended that service was done on the respondent by their letter dated 22 November 2001. The respondent however denies having been served at all with the same. In respect of this supplementary appeal record, it is contended by the respondent that the same was filed late and without the leave of the court and they were prejudiced by this fact. It is to be noted that the supplementary appeal record filed on 27 November 2001 contains only the sealed copy of the order and nothing else, and having perused the same and the draft order in the appeal record (encl 6), I fail to see how the appellant has been prejudiced by the said document. The only difference between the two documents seems to be the presence of the court's seal and the registrar's signature on the document in encl 10 which contains a sealed order of the court. On the facts and circumstances submitted before me, I find that the appellant has taken the necessary steps to remedy the appeal record (encl 6) and this conduct of the appellant bears an important distinction with the situation and the conduct of the appellant in *Alor Janggus*. Further, as submitted by learned counsel for the appellant, under Arahan Amalan No 2 Tahun 1998, there is no necessity to apply for leave to file a supplementary appeal record, and for that matter, an appeal record can be filed at the first instance even without the order appealed from. For ease of reference, the said Arahan Amalan No 2 Tahun 1998 is reproduced in extenso which is as follows:

ARAHAN AMALAN NO 2 TAHUN 1998
Memasukkan Salinan Penghakiman Dekri atau Perintah
Yang Dirayu ke Dalam Rekod Rayuan bagi Rayuan Sivil
Di Mahkamah Tinggi

A

Saya dengan hormatnya diarahkan merujuk kepada perkara di atas.

2 Di bawah peruntukkan A 49 k 3A(1)(d) Kaedah-Kaedah Mahkamah Rendah 1980, seseorang perayu adalah dikehendaki menyertakan satu salinan penghakiman dekri atau perintah yang hendak dirayu, ke dalam rekod rayuan. Walau bagaimanapun masih terdapat rekod rayuan yang tidak disertakan dengan salinan penghakiman, dekri atau perintah seperti yang dikehendaki oleh kaedah yang disebutkan di atas. Keadaan ini telah menyebabkan kelewatan bagi penetapan kes-kes rayuan di Mahkamah Tinggi.

B

3 Bagi mengatasi masalah ini dan untuk menyegerakan prosiding rayuan di Mahkamah Tinggi, YAA Hakim Besar Malaya telah mengarahkan supaya bagi rekod-rekod rayuan yang masih belum disertakan dengan salinan penghakiman, dekri atau perintah, pihak perayu bolehlah, sebaik sahaja menerima penghakiman, dekri atau perintah termeterai dari mahkamah rendah, memfailkannya sebagai rekod rayuan tambahan tanpa memfailkan sebarang permohonan.

C

4 Ini juga bermakna bagi rekod rayuan yang belum difailkan disebabkan ketiadaan penghakiman, dekri atau perintah termeterai maka rekod rayuan berkenaan bolehlah difailkan terlebih dahulu dan amalan di atas hendaklah terpakai apabila perayu telah menerima penghakiman, dekri atau perintah termeterai untuk difailkan sebagai rekod rayuan tambahan.

D

5 Arahan Amalan ini berkuatkuasa mulai 1 Julai 1998.

E

On the aforesaid reasons, I find no merit in the respondent's argument in respect of this issue and accordingly hold that the objection raised against the record of appeal and the supplementary appeal record be dismissed.

On the contention that the grounds of decision and the notes of evidence are not in accordance with s 76 of the Evidence Act 1950, having

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perused the record of appeal (encl 6), I am satisfied that s 76 of the Evidence Act 1950 has been satisfied. The certification on pp 8 and 28 of encl 6 in respect of the notes of evidence and the grounds of decision respectively is self explanatory and needs no further elaboration. Such certification is sufficient for the purposes of s 76 of the Act.

G

One further point which has been advanced by the respondent as a ground of objection to this appeal is in respect of the contradiction between the notice of appeal and the memorandum of appeal. In the notice of appeal, the appellant sought to appeal against the whole of the decision of the learned magistrate, while in the memorandum of appeal it appears that only the issue of liability is appealed against as stated in para 1 at p 3 of

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encl 6. Without elaborating further on the issue, I think in an appeal of this nature, namely on the question of liability in an accident claim, it goes without saying that once the issue of liability is appealed against and if subsequently allowed, certainly the issue of quantum of damages will also be accordingly affected and/or needs to be altered. Does it mean that if the issue of quantum is not pleaded in the memorandum of appeal, it cannot be

I

disturbed even if the issue of liability of the parties to the claim is reversed or apportioned accordingly. I think not. The case of *Peggy Mavis Moreira (representing the estate of Frances Theodara Eveleen Foenander, deceased) &*

Anor v Manivail s/o Ramasamy [2001] 2 MLJ 79 cited by the learned counsel for the respondent is of no avail to support her submission for the simple reason that in that case, the notice of appeal is defective and the appeal therefore was not properly before the court. Counsel sought to rely on the said case as an authority to support her view that a contradiction between the notice of appeal and the memorandum of appeal is such a defect that merits the dismissal of the appeal. I do not think that case can support such a proposition. Having considered the nature of the subject matter of the appeal before me, I do not think the contradiction between the notice of appeal and the memorandum of appeal is of such a nature as to cause prejudice to the appellant and as I have stated much earlier, under no circumstance at all can the issue of quantum be left untouched or unaffected if the liability of the parties to this appeal is subsequently altered or apportioned by the court. In such a situation, it makes no difference whether the issue of quantum is pleaded or not in the memorandum of appeal for it to be dealt with by this court.

For the reasons adumbrated above, I hold that there is no merit in the preliminary objections raised by the respondent and accordingly dismiss them, and the hearing of this appeal shall therefore proceed on the merits of the case.

Preliminary objections dismissed.

Reported by D Sivalingam